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IN THE

Supreme Court of the United States

October Term, 1959

No. 222

HELEN COVINGTON, *et al.*,

Petitioners,

—v.—

J. S. EDWARDS, Superintendent of Schools of Montgomery County, North Carolina, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled case on March 19, 1959.

Citations to Opinions Below

The opinion of the District Court (R.[1] 49a), printed in the Appendix hereto, *infra*, p. 24, is reported in 165 F. Supp. 957. The opinion of the United States Court of Appeals (R. 73), printed in the Appendix hereto, *infra*, p. 29, is reported in 264 F. 2d 780.

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[1] R. refers to the record herein which consists of the appendices to the briefs filed and the proceedings in the court below.

Jurisdiction

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on March 19, 1959 (R. 81; p. 35, *infra*). On June 16, 1959 the Chief Justice extended time for filing this petition to and including July 17, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Question Presented

Whether the Fourteenth Amendment requires that respondent school officials devote every effort toward initiating desegregation and bringing about the elimination of racial discrimination in the public school system of Montgomery County, North Carolina, or whether, as the Courts below held, the board may reject petitioners' petition for desegregation, continue its plan of segregated schools, and relegate individual Negro children seeking their constitutional right to non-segregated education to a pupil placement procedure whereby they must apply to particular white schools in the school system which continues to be conducted on a segregated basis.

Constitutional and Statutory Provisions Involved

This case involves the following constitutional provisions and statutes:

1. United States Constitution, Amendment 14, §1.

2. General Statutes of North Carolina, §§115-176 to 115-179. (North Carolina Assignment and Enrollment of

Pupils Act). The statute is printed in the Appendix, *infra*, p. 21.[2]

Statement

The complaint in this action was filed on July 29, 1955 in the United States District Court for the Middle District of North Carolina by petitioners, a group of Negro school children in Montgomery County, North Carolina, and their respective parents and guardians as next friends and individually, against respondents, the Superintendent of Schools and the members of the Montgomery County Board of Education.

The jurisdiction of the District Court was invoked pursuant to 28 U. S. C. 1331, 28 U. S. C. 1343, and 8 U. S. C. 41, 43 (which now appear as 42 U. S. C. 1981, 1983). The action was brought as a class action pursuant to Rule 23(a)(3) Federal Rules of Civil Procedure.

On September 7, 1954 Negro residents of Montgomery County, North Carolina, submitted a petition to respondents setting forth this Court's holding in *Brown* v. *Board of Education*, stating that in spite of that decision segregation continued to be enforced in the county schools and praying that they be desegregated (R. 23a, 24a). When this petition was denied complaint was filed in the United States District Court.

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[2] When this litigation commenced, the North Carolina pupil assignment statute had not yet been amended to its present form. As originally written the statute provided that applications for change of assignment should be directed to the appropriate public school official. It now provides that application is to be made to the board of education. None of the parties nor the courts below have viewed this change as material to this suit (§115-178).

The principal allegations of the complaint are that respondents maintain racial segregation in the public schools administered by them; that petitioners had filed a petition with respondents requesting that segregation be abolished; and that respondents refused to abolish racial segregation, all in violation of the Fourteenth Amendment to the United States Constitution, and 42 U. S. C. 1981. The complaint prayed for an injunction ordering the respondents "to promptly present a plan of desegregation to [the] Court which will expeditiously desegregate the schools in Montgomery County," and for a general injunction prohibiting racial segregation.

The answer in general pleaded that petitioners had failed to exhaust an administrative remedy adopted by resolution and subsequently, in substance, by statute, allowing individual Negro children to seek change of assignment from board imposed segregation; that respondents had no power under then existing state statutes to act pursuant to the petition seeking desegregation; and that respondents had adopted a resolution denying the request for desegregation. This resolution was set forth in *haec verba* in the answer; it provided that the schools should continue to operate during the then forthcoming 1954-55 school term as they had in the past, awaiting the final decree of this Court in *Brown* v. *Board of Education*, 347 U. S. 483, which was then awaiting further argument on formulation of the decree. The resolution stated:

> The Board deems it for the best interest of public education to await the final decree of the Court and in the meantime operate the public schools of North Carolina as now constituted (R. 15a).

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[2] Various preliminary proceedings in the District Court, unimportant for purposes of this petition, including amendments to the pleadings and several motions, are described in the opinion of the District Court (R. 50a-51a).

The answer further asserts that after the 1955 decision in *Brown v. Board of Education*, 349 U. S. 294, another resolution, also set forth in the answer, was adopted by respondents. This resolution provided:

> "Now, therefore, be it resolved that the Public Schools of Montgomery County operate during the 1955-56 term with practices of enrollment and assignment of children similar to those in use during the 1954-55 school year, and that this resolution be the authority for the County Superintendent and the various district school principals and officials to so act (R. 18a, 19a).

There was a proviso that parents dissatisfied with the assignment of their children might apply to the principal of the school to which assignment was desired, and if unsuccessful, to the county board of education, requesting a change of assignment (R. 19a). The Court of Appeals found that the system of planned segregation continues to the present time, 264 F. 2d 780, 783; R. 78.

On March 26, 1958 respondents' motion to dismiss the complaint for failure to state a claim upon which relief could be granted, and petitioners' motion for leave to file a supplemental complaint[1] and to add parties defendant, were heard. The District Court granted the motion to dismiss, and denied the motion to file a supplemental complaint and to add parties defendant, holding that since petitioners had not alleged that they had exhausted the remedies prescribed by the North Carolina Assignment and Enrollment of Pupils Act they were not entitled to injunctive relief in the federal courts, and that both the original and the proposed supplemental complaints failed

[1] The supplemental complaint would have made state education officials parties defendant. That aspect of the case is not brought here by this petition.

to state a claim upon which relief might be granted. The District Court entered judgment dismissing the cause on October 6, 1958, and the judgment was appealed to the United States Court of Appeals for the Fourth Circuit. The Court of Appeals entered a decree affirming the judgment of the District Court on March 19, 1959.

REASONS FOR GRANTING THE WRIT

I.

The decision of the Court of Appeals conflicts with the decisions of this Court in *Brown* v. *Board of Education* and *Cooper* v. *Aaron*.

The disposition the Court of Appeals made of this case conflicts with the holdings of this Court that the Fourteenth Amendment requires the state to discontinue its practice of assigning pupils in its public schools on the basis of their race. *Brown* v. *Board of Education*, 347 U. S. 483; 349 U. S. 294; *Cooper* v. *Aaron*, 358 U. S. 1. As delineated in *Cooper*, the constitutional injunction requires " 'a prompt and reasonable start toward full compliance' " and action "necessary to bring about the end of racial segregation in the public schools 'with all deliberate speed' " (358 U. S. at 7). Indeed, "in many locations, obedience to the duty of desegregation would require the immediate general admission of Negro children, otherwise qualified as students for their appropriate classes, at particular schools," and even where "relevant factors" might establish justification "for not requiring the present nonsegregated admission of all qualified Negro children" it is essential that the school authorities show that they "had developed arrangements pointed toward and had taken appropriate steps to put their program into effective operation . . ." "[O]nly a prompt start, diligently and earnestly pursued, to eliminate

racial segregation from the public schools could constitute good-faith compliance" (*Id.* at 7).

In sum, as this Court emphasized in *Cooper*:

> State authorities were thus duty bound to devote every effort toward initiating desegregation and bringing about the elimination of racial discrimination in the public school system (*Id.* at 7).

and that,

> State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws (*Id.* at 19).

In 1954, Montgomery County ignored the first pronouncement in *Brown* and adhered to its pre-existing pattern of racially separated public schools by resolving to continue operation of the county's then segregated schools as "now constituted" (R. 15a). It remained aloof to its constitutional responsibilities when, a year later, it resolved to continue for 1955-56 "practices of enrollment and assignment of children similar to those in use during the 1954-55 school year . . ." (R. 18a-19a). The Court of Appeals recognized the intransigent attitude of the school authorities toward petitioners' request for desegregation:

> We are advertent to the circumstances upon which the plaintiffs rest their case, namely, that the County Board has taken no steps to put an end to the planned segregation of the pupils in the public schools of the county but, on the contrary, in 1955 and subsequent years, resolved that the practices of enrollment and assignment of pupils for the ensuing year should be similar to those in use in the current year. 264 F. 2d at 783 (R. 78).

With this acknowledgment, the Court should at this point have directed that petitioners be awarded injunctive relief against the clear constitutional violation. Instead, the Court held that respondents may continue the pattern of segregated schools, resulting from the practice of assignment by race, if children are provided an administrative procedure by the use of which they may individually seek to escape the discrimination. The possibility of an escape, it felt, is afforded by the board's resolutions and the state pupil assignment law, which for all relevant purposes are the same; the District Court's dismissal of the complaint was affirmed on the ground that this "remedy" should have been exhausted. In short, it approved respondents' practice of initially assigning school children on a racial basis, and requiring their attendance in segregated schools, simply because each child might individually undertake an administrative course which might lead to his reassignment to another school in an otherwise segregated system.

Such an arrangement falls far short of satisfying the constitutional mandate that the state abstain from racial classifications in its public school system. The continued funneling of Negro children into Negro schools and the requirement that they continue attending such schools, even though subject to the possibility of securing individual reassignment to another school, does not constitute an arrangement for desegregating the schools or even a step in that direction. Rather, it is a general requirement of racial classification of all children until and unless particular children may succeed in administratively excepting themselves from its operation.

This Court's decisions in *Brown* and *Cooper* establish the right of all children to freedom from state imposed educational segregation based on color. They make plain the state's duty to afford, not merely an ostensible freedom,

but freedom in fact, and do not contemplate an arrangement perpetuating segregation subject to an individual administrative procedure by which that freedom can be achieved only in isolated instances. Moreover, the command of the Fourteenth Amendment against racial discrimination is addressed to the state and is disobeyed by a requirement that burdens the individual with the necessity of demonstrating an exception in his favor from the general policy of racial classification and discrimination which it continues. Obviously, the state cannot be permitted to shift to the individual the responsibilities which the Constitution imposes upon it. The duty is upon the state, rather than the individual, to bring the unconstitutional system which it has constructed to an end, and this duty, like the right with which it is correlated, "can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted 'ingeniously or ingenuously.'" *Cooper* v. *Aaron*, *supra*, 358 U. S. at 17. See also *Lane* v. *Wilson*, 307 U. S. 268.

Moreover, in petitioners' view, the Pupil Assignment Statute is irrelevant to the present issue and the doctrine of exhaustion of administrative remedies has no application to this case. The statute does not afford the administrative means capable of furnishing the relief to which petitioners are entitled; it neither requires segregation nor affords a means of eliminating segregation. It permits continuation of a racially classified system— including the initial assignment of first graders to segregated schools—subject solely to the exception that individual Negro students may

[1] No class proceedings are permitted under the Pupil Assignment Statute. See the instant case at 264 F. 2d 783; Joyner v. Board of Education, 244 N. C. 164, 92 S. E. 2d 795 (1956).

thereafter seek assignment to "white" schools. Relevant portions of the Act state:

> If, at the hearing, the board shall find, that *the child* is entitled to be reassigned to *such* school, or if the board shall find that the reassignment of *the child* to *such* school will be for the best interests of *the child*, and will not interfere with the proper administration of *the school*, or with the proper instruction of the pupils there enrolled, and will not endanger the health or safety of the children there enrolled, the board shall direct that *the child* be reassigned to and admitted to *such* school. (Emphasis supplied.)

At most, this remedy could only enable a particular child to secure entry to a particular school. Petitioners' constitutional right is not so limited. They desire, and view the Constitution as securing, the opportunity to attend school in a nonsegregated system. Any administrative remedy adequate from this viewpoint must be one which affords an opportunity to abolish racial distinctions within the school system and put an end to what the Court of Appeals called "the planned segregation of the pupils of the public schools of the county."[*] The placement statute obviously does not supply such an opportunity.

Despite the shortcomings of the statute, however, the school board, within the general powers conferred upon it, could grant the type of relief which petitioners requested. Petitioners pursued *that* administrative remedy by a petition asking the board to prepare and pursue a plan of general desegregation. The petition charged that the board's segregation practices violated the Constitution and prayed that "all schools under your jurisdiction be immediately desegregated in accordance with the Supreme Court's deci-

[*] 264 F. 2d at 783.

sion" (R. 24a). This the board refused to do, insisting upon a power to continue segregation subject to individual exceptions which may be sought via the pupil placement plan. Similarly, the complaint in this case did not ask for entry of a particular child to a particular school. It prayed that the Court order "defendants to promptly present a plan of desegregation to this Court which will expeditiously desegregate the schools in Montgomery County . . ." (R. 9a).

More fundamentally, neither the assignment statute nor the exhaustion doctrine has relevance in this case save as attempted justifications for respondents' past and present segregation practices. For it is because petitioners declined to undertake the statutory assignment procedures that they have been denied relief by the school authorities and the courts below. Meanwhile, respondents continue to assign children to racially segregated schools, and assert no present intention to abandon the practice, and seek refuge in the assignment legislation when requested to desist therefrom. But it is very clear that the constitutional violations evident from respondents' conduct cannot be excused by resort to the statute. The Constitution, as interpreted by this Court, incorporates "the fundamental principle that racial discrimination in public education is unconstitutional"—a doctrine supreme to the point that: "All provisions of federal, state, or local law requiring or permitting such discrimination must yield to this principle." *Brown* v. *Board of Education*, 349 U. S. 294, 298. Neither the North Carolina assignment statute nor any other law can justify the constitutional violations that respondents continue to commit, and, so long as these violations continue, neither this Court nor the petitioners need have concern with a state law having to do only with the individual assignment of children to particular schools.

II.

The decision of the Court below conflicts with the decisions of another Court of Appeals, and the conflict should be resolved by this Court.

The Court of Appeals for the Fourth Circuit has consistently held that state administrative remedies must be exhausted prior to judicial application for relief from segregated schooling. *Carson* v. *Board of Education of McDowell County*, 227 F. 2d 789 (4th Cir. 1955); *Carson* v. *Warlick*, 238 F. 2d 724 (4th Cir. 1956), cert. denied 353 U. S. 910. On the day that it decided the instant case it also decided *Holt* v. *Raleigh City Board of Education*, 265 F. 2d 95, 98 (4th Cir. 1959), in which the Raleigh City Board of Education also was found to be continuing racial segregation. The Court held:

> The regulations adopted by the Board in 1957, pursuant to §115-176 of the statute, tended to perpetuate the system, for they provided that each child attending a school by assignment of the Board is assigned to the same school for the ensuing school year.

The Court of Appeals for the Fifth Circuit, however, has recognized the constitutional infirmity in a position like that taken by the Montgomery County Board and endorsed by the Fourth Circuit. The Fifth Circuit in *Gibson* v. *Board of Public Instruction of Dade County*, 246 F. 2d 913 (5th Cir. 1957) dealt with an essentially identical legal situation. The Dade County School Board had adopted a resolution substantially the same as that adopted by the Montgomery County Board. The Dade County Board had resolved:

> "It is deemed by the Board that the best interest of the pupils and the orderly and efficient administration of the school system can best be preserved if the registration and attendance of pupils entering school com-

> mencing the current school term remains unchanged. Therefore, the Superintendent, Principals and all other personnel concerned are herewith advised that until further notice the free public school system of Dade County will continue to be operated, maintained and conducted on a nonintegrated basis" (at 914).

The plaintiffs in the *Gibson* case had requested, in language almost identical to the request of the plaintiffs in the instant case, that "the Board of Public Instruction . . . abolish racial segregation in the public schools of the County as soon as is practicable in conformity with the decision of the Supreme Court of the United States in *Brown v. Board of Education*" (at 913). In defense the Dade County Board had argued that plaintiffs had not exhausted their administrative remedies provided by the Florida Pupil Assignment Act. Judge Rives ruled that recourse to the Pupil Assignment Act could not be required until the policy of segregation is first abolished:

> "The appellees urge also that the judgment should be affirmed because the plaintiffs have not exhausted their administrative remedies under the Florida Pupil Assignment Law of 1956, Chapter 31380, Laws of Florida, Second Extraordinary Session 1956, F. S. A. §230.-231. Neither that nor any other law can justify a violation of the Constitution of the United States by the requirement of racial segregation in the public schools. So long as that requirement continues throughout the public school system of Dade County, it would be premature to consider the effect of the Florida laws as to the assignment of pupils to particular schools."

On remand to the district court, that court held that the state pupil assignment law is a plan of desegregation. *Gibson v. Board of Public Instruction of Dade County*, 170 F. Supp. 454 (D. Fla. 1959). This ruling is now on appeal.

"The district court erred in dismissing the complaint. Its judgment is reversed and the cause remanded" (at 913-914).

Similarly, in *Holland* v. *Board of Public Instruction*, 258 F. 2d 730, Judge Rives held for the Court of Appeals that the procedures afforded by the Florida Pupil Assignment Act need not be employed until the policy of segregation first was abolished in Palm Beach County. In that case, it may be noted, the county continues to enforce a residential segregation ordinance like that outlawed by *Buchanan* v. *Warley*, 245 U. S. 60. But the question of residential segregation was hardly crucial to the case as, obviously, it is possible to have school desegregation with residential segregation and *vice versa*. The fact of compulsory residential segregation merely served to underscore the discriminatory approach to law enforcement employed by the county government.

In the *Holland* case the plaintiff had applied to a school farther from his home than the Negro school to which he was assigned. The District Court had indicated, among other reasons, that because the plaintiff was assigned to the nearest school his constitutional rights had not been infringed. But, as Judge Rives wrote, "that the plaintiff was ineligible to attend the school to which he applied would not, however, excuse a failure to provide nonsegregated schools." If the Pupil Assignment Statute had governed it would seem that the distance of the "white" school from plaintiff's home would have concluded the matter and permitted the continued segregation of plaintiff.

While a conflict between a Court of Appeals and a District Court is not as compelling a reason for granting certiorari as a conflict between two Courts of Appeal, it is worthy of note that, in addition to the difference between the Fourth and Fifth Circuits, the United States

District Court for the Middle District of Tennessee is in accord with the Fifth Circuit. In *Kelly v. Board of Education of the City of Nashville*, Judge William E. Miller addressed himself directly to the rulings of the Fourth Circuit. He pointed out that the relief which the Nashville plaintiffs sought was not merely to attend a particular school, but to attend schools in a system devoid of racial classifications. The pupil assignment law did not furnish a remedy to achieve this end:

> "However, notwithstanding the apparent scope and generality of the rulings of the Fourth Circuit in the two cases just cited, the Court is unable to reach the conclusion on the facts of the instant case that the action should be dismissed and the plaintiffs remitted to a so-called administrative remedy, with the implied invitation to return to the Federal Court if that remedy is exhausted without obtaining satisfactory results. This is true because the Court is of the opinion that the administrative remedy under the Act in question would not be an adequate remedy. In this connection, it must be recalled that the relief sought by the complaint is not merely to obtain assignment to particular schools but in addition to have a system of compulsory segregation declared unconstitutional and an injunction granted restraining the Board of Education and other school authorities from continuing the practice and custom of maintaining and operating the schools of the city upon a racially discriminatory basis." 159 F. Supp. at 275.

The conflict is clear. While petitioners submit that the Fifth Circuit is correct and the Fourth Circuit is wrong, this Court, in any event, should resolve the difference in the interest of uniformity where so important a constitutional right is involved.

III.

The decision below presents important questions of federal jurisdiction, practice and procedure which should be resolved by this Court.

This Court exercises supervision over the lower federal judiciary to assure the proper and efficient functioning of the District Courts. See, e.g., *McNabb* v. *United States*, 318 U. S. 332, 341 (administration of criminal justice); *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501 (forum non conveniens doctrine); *Hickman* v. *Taylor*, 329 U. S. 495 (construction of federal rules of civil procedure). This case invokes such power. See Wolfson and Kurland, *Robertson and Kirkham Jurisdiction of the Supreme Court of the United States*, §353 (1951).

In *Brown* v. *Board of Education*, 349 U. S. 294, this Court provided certain general guides to the lower federal courts for the disposition of school segregation litigation. In delineating the types of matters to be considered by the lower federal courts in framing decrees dealing with "a variety of local problems," this Court emphasized the use of "practical flexibility" toward the end of eliminating "a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in [the] May 17, 1954 decision." None of these criteria even suggested that segregation may continue to be maintained. But the Court of Appeals, while explicitly recognizing that the respondent school board has taken "no steps to put an end to the planned segregation of the pupils in the public schools of the country," 264 F. 2d at 783, held that petitioners and the class they represent, were not entitled to require that respondents discontinue the system of planned segregation. The remedy was held to be an injunctive order requiring the admission of in-

dividual Negro litigants to designated schools, after they have exhausted the state's prescribed administrative "remedy." This view of the District Courts' duty will necessitate a detailed review of individual school assignments by the federal judiciary for a very large number of pupils who contend that they are excluded from particular schools because of race. Insofar as the efficient functioning of the federal judiciary is concerned, the burden of individual review of school assignments promises to become insupportable.[8]

At the second reargument of *Brown* v. *Board of Education, supra*, perhaps the most frequently voiced concern of the parties and *amici* alike was that implementation of the decision should not involve the federal judiciary in the day-to-day administration of local school systems. Or, as it was so often stated, the courts should not become school boards.[9]

Indeed, although petitioners do not suggest that the *amicus curiae* brief of the State of North Carolina in the School Segregation cases is binding upon it in this litigation, it is suggestive to note that in that brief the State suggested as possible modes of compliance:

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[8] It is true that the Court of Appeals' decision contemplates that class action may be brought (R. 78). But the members of the class are those who have employed the so-called Pupil Placement remedy. Since the pupil placement remedy involves individualized consideration of each child's right to attend a particular school a factual review of each child's right to attend a particular school is called for. At best, then, the right to bring a class suit in this sense means that many suits may be consolidated. Under petitioners' view, however, the courts should be concerned solely with the issue of whether a racial standard is employed.

[9] See, e.g., the Brief of Attorney General of Florida as *amicus curiae* in Brown v. Board of Education, October Term, 1954 at page 82; brief of Attorney General of the State of Texas as *amicus curiae* at page 26; brief of the Attorney General of the State of Arkansas as *amicus curiae* at page 18.

(1) Assignments of white and Negro children to schools on the basis of residence alone;

(2) Segregation of children in schools on the basis of sex, the basis of intelligence tests, the basis of achievement tests, or any other basis except race, provided only that the basis has a reasonable relation to the proper conduct of the schools or to the maintenance of the public safety, morals, health or welfare . . . ;

(3) Discontinuance of the present state-wide school system and leaving to each county or community the decision as to whether it will have public schools operated on the one or the other of these bases. . . . It is submitted that the choice to be made between these or other methods leading to a constitutional result is for the State of North Carolina.[10]

It was not suggested that segregation could be maintained subject to individual transfers out of segregated schools.

Already federal courts in North Carolina have had before them under the rule applied in this case[11] a substantial number of cases involving pupils on whose individual qualifications to attend particular school buildings, or the regularity of the administrative proceedings in which they must first seek vindication of their constitutional rights, the courts must pass if the rationale of the instant decision is correct.

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[10] At page 13.

[11] See, e.g., Holt v. Raleigh City Board of Education, 265 F. 2d 95 (4th Cir. 1959); McKissick v. Durham City Board of Education (D. C. M. C. N. C., Civil Action No. C-100-D-58); Morrow v. Mecklenburg County Board of Education (D. C. W. D. N. C., Civil Action No. 1415); McCoy v. Greensboro City Board of Education (D. C. M. D. N. C., Civil Action No. C-28-G-59); Cannon v. Greensboro City Board of Education (D. C. M. D. N. C., Civil Action No. C-25-G-59); Jeffers v. Whitley, 165 F. Supp. 951 (D. C. N. C. 1958).

Petitioners, however, view the federal judiciary's role as being solely to eliminate the use of racial standards in the system and not to become involved in multitudinous individual assignments. While an individual's qualifications might, of course, be relevant in attempting to ascertain whether a board is employing subterfuge, a typical segregation suit should concern itself only with whether race is used as a standard of school assignment. Where, as here, race is used, it should merely be eliminated by application of a constitutionally acceptable plan of desegregation.

Moreover, the proper functioning of the district court was violated in yet another way. As Mr. Justice Frankfurter stated concurring in *Hurd* v. *Hodge*, 334 U. S. 24, 36, "equity is rooted in conscience." Equitable doctrines, therefore, may not be invoked by those who, as that opinion pointed out, violate the constitution of the United States by racial discrimination—a violation not "narrow" or "technical," but involving "considerations that touch rights so basic to our society that, after the Civil War, their protection against invasion by the States was safeguarded by the Constitution." Here respondents segregate. When petitioners applied to equity for relief, respondents prayed that the chancellor remit petitioners back to respondents in the exercise of an equitable doctrine of self restraint. But, petitioners submit, a court of equity should not have its patience invoked by those who have baldly continued to apply a constitutionally forbidden standard. Employment of such a rule calls for the corrective supervision of this Court.

Unless the erroneous decision of the court below is rectified so that the District Court will proceed in cases of this sort under the general directions of *Brown* v. *Board of Education* and *Cooper* v. *Aaron* discussed *supra*, not only will the rights here involved continue to be denied, but the Federal Courts will indeed become overburdened, and as

some have feared, in fact take on the role of local boards of education in the name of equity at the behest of those who have come into court without clean hands.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

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APPENDIX

North Carolina Assignment and Enrollment of Pupils Act Article 21

§ 115-176. *County and city boards authorized to provide for enrollment of pupils.*—Each county and city board of education is hereby authorized and directed to provide for the assignment to a public school of each child residing within the administrative unit who is qualified under the laws of this State for admission to a public school. Except as otherwise provided in this Article, the authority of each board of education in the matter of assignment of children to the public school shall be full and complete, and its decision as to the assignment of any child to any school shall be final. A child residing in one administrative unit may be assigned either with or without the payment of tuition to a public school located in another administrative unit upon such terms and conditions as may be agreed in writing between the boards of education of the administrative units involved and entered upon the official records of such boards. No child shall be enrolled in or permitted to attend any public school other than the public school to which the child has been assigned by the appropriate board of education. In exercising the authority conferred by this Section, each county and city board of education shall make assignments of pupils to public schools so as to provide for the orderly and efficient administration of the public schools, and provide for the effective instruction, health, safety, and general welfare of the pupils. Each board of education may adopt such reasonable rules and regulations as in the opinion of the board are necessary in the administration of this Article.

§ 115-177. *Authority to be exercised for efficient administration of school, etc.; rules and regulations.*—In exer-

cising the authority conferred by § 115-176, each county or city board of education may, in making assignments of pupils, give individual written notice of assignment, on each pupil's report card or by written notice by any other feasible means to the parent or guardian of each child or the person standing in loco parentis to the child, or may give notice of assignment of groups or categories of pupils by publication at least two times in some newspaper having general circulation in the administrative unit.

§ 115-178. *Hearing before board upon denial of application for enrollment.*—The parent or guardian of any child, or the person standing in loco parentis to any child, who is dissatisfied with the assignment made by a board of education may, within ten (10) days after notification of the assignment, or the last publication therefor, apply in writing to the board of education for the assignment of the child to a different public school. Application for reassignment shall be made on forms prescribed by the board of education pursuant to rules and regulations adopted by the board of education. If the application for reassignment is disapproved, the board of education shall give notice to the applicant by registered mail, and the applicant may within five (5) days after receipt of such notice apply to the board for a hearing, and shall be entitled to a prompt and fair hearing on the question of reassignment of such child to a different school. A majority of the board shall be a quorum for the purpose of holding such hearing and passing upon application for reassignment, and the decision of a majority of the members present at the hearing shall be the decision of the board. If, at the hearing, the board shall find that the child is entitled to be reassigned to such school, or if the board shall find that the reassignment of the child to such school will be for the best interests of the child, and will not interfere with the proper administration

of the school, or with the proper instruction of the pupils there enrolled, and will not endanger the health or safety of the children there enrolled, the board shall direct that the child be reassigned to and admitted to such school. The board shall render prompt decision upon the hearing, and notice of the decision shall be given to the applicant by registered mail.

§ 115-179. *Appeal from decision of board.*—Any person aggrieved by the final order of the county or city board of education may at any time within ten (10) days from the date of such order appeal therefrom to the superior court of the county in which such administrative school unit or some part thereof is located. Upon such appeal the matter shall be heard de novo in the superior court before a jury in the same manner as civil actions are tried and disposed of therein. The record on appeal to the superior court shall consist of a true copy of the application and decision of the board, duly certified by the secretary of such board. If the decision of the court be that the order of the county or city board of education shall be set aside, then the court shall enter its order so providing and adjudging that such child is entitled to attend the school as claimed by the appellant, or such other school as the court may find such child is entitled to attend, and in such case such child shall be admitted to such school by the county or city board of education concerned. From the Judgment of the superior court an appeal may be taken by any interested party or by the board to the Supreme Court in the same manner as other appeals are taken from judgments of such court in civil actions.

Opinion

IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
ROCKINGHAM DIVISION
Civil No. 323-R

* * * * *

STANLEY, *District Judge*:

The complaint in this action was filed on July 29, 1955, as a class action by thirteen adult plaintiffs personally and as next friend of forty-five minor plaintiffs, on behalf of themselves and all other citizens and residents of Montgomery County, North Carolina, similarly situated. Named as defendants are the Superintendent of Schools of Montgomery County, North Carolina, and the individual members of the Montgomery County Board of Education.

In their complaint, plaintiffs asked (1) that a three-judge court be convened, (2) that interlocutory and permanent judgments be entered "declaring that Article IX, Section 2, of the North Carolina Constitution, and any customs, practices and usages pursuant to which plaintiffs are segregated in their schooling because of race, violate the Fourteenth Amendment to the United States Constitution", and (3) that interlocutory and permanent injunctions issue "ordering defendants to promptly present a plan of desegregation to this court which will expeditiously desegregate the schools in Montgomery County and forever restraining and enjoining defendants and each of them from thereafter requiring these plaintiffs and all other Negroes of public school age to attend or not to attend public schools in Montgomery County because of race."

Plaintiffs were allowed to amend their complaint on August 12, 1955, but without changing the nature of their cause of action. Thereafter, an order was signed denying plaintiffs' motion for a three-judge court.

After receiving an extension of time within which to answer, the defendants filed their answer on September 12, 1955, alleging failure to exhaust administrative remedies and lack of good faith on the part of the plaintiffs in bringing the action. Upon motion of plaintiffs, a portion of the answer charging plaintiffs with lack of good faith was stricken.

Thereafter, plaintiffs filed a motion to amend their complaint to allege that defendants are officers of the State of North Carolina, enforcing and executing state statutes and policies. After a hearing on this motion, an order was entered by the court on December 16, 1955, allowing the amendment.

On February 23, 1956, plaintiffs petitioned the court to reconsider its order denying their motion for a three-judge court. This motion was again denied in an opinion rendered by Judge Johnson J. Hayes on April 6, 1956. *Covington v. Montgomery County School Board*, 139 F. Supp. 161 (M. D. N. C., 1956).

On September 13, 1956, plaintiffs filed a motion for leave to file amended and supplemental complaint and to add parties defendant. In the supplemental complaint, plaintiffs seek to test the constitutionality of certain state school laws, commonly known and referred to as the "Pearsall Plan," and seek to make the members of the State Board of Education and the Superintendent of Public Instruction of the State of North Carolina parties defendant. Thereafter, the Attorney General of the State of North Carolina made a special appearance on behalf of members of the Board of Education and the State Superintendent of Public Instruction in opposition to plaintiffs' motion,

and the defendants filed a motion to dismiss the complaint for failure to state a claim on which relief could be granted, and for failure to prosecute.

A hearing on pending motions was held on March 26, 1958, at which time the Court ordered the parties to file briefs setting forth their legal contentions on all issues raised by the pleadings and the pending motions. The Attorney General of the State of North Carolina was directed to file a brief with the court with respect to his position on all the issues raised in the pleadings.

The principal questions now before the court for determination are (1) whether the complaint, or proposed amended and supplemental complaint, states a claim against the defendants on which relief can be granted, and (2) whether the members of the State Board of Education and the State Superintendent of Public Instruction are necessary and proper parties to the action.

The decision that has been reached on the first question makes a determination of the second question unnecessary for disposition of this case. However, in regard to the second question, this court has today rendered an opinion in another case, *John L. Jeffers, et al. v. Thomas H. Whitley, Superintendent of the Public Schools of Caswell County, et al.*, —— F. Supp. —— (D. C. M. D. N. C., 1958), in which it was held that the members of the State Board of Education and the State Superintendent of Public Instruction are neither necessary nor proper parties in actions of this type.

In regard to the first issue, it should be stated at the outset that the plaintiffs have not alleged in either their original complaint, or in their proposed amended and supplemental complaint, that there has been any exhaustion of their administrative remedies as provided for in Sec. 115-176 through 115-178 General Statutes of North Carolina, known as the Enrollment and Assignment of Pupils

Act. Indeed, in their brief, plaintiffs admit that they did not proceed under this act, and contend that exhaustion of administrative remedies provided for by the act are unnecessary.

Counsel for the plaintiffs make this contention in face of the decisions rendered by the Court of Appeals for this circuit in *Carson* v. *Board of Education of McDowell County*, Cir. 4, 227 F. 2d 789 (1955), and *Carson* v. *Warlick*, Cir. 4, 238 F. 2d 724, certiorari denied 353 U. S. 910, 77 S. Ct. 665, 1 L. Ed. 2d 664.

They advance the argument that the presumption relied on in *Carson* v. *Warlick*, *supra*, that school officials "will obey the law, observe the standards prescribed by the legislature, and avoid the discrimination on account of race which the Constitution forbids" is not valid because of the length of time that has passed since the decision of the Supreme Court of the United States in *Brown* v. *Board of Education*, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), without the defendant's acting to desegregate the public schools of Montgomery County. The fallacy of this argument is readily seen when one reflects on what the Supreme Court actually held in the *Brown* case. As has been repeatedly stated, the *Brown* case does not require integration, but only holds that states can no longer deny to anyone the right to attend a school of their choice on account of race or color. *Briggs* v. *Elliott*, 132 F. Supp. 776 (E. D. S. C., 1955); *Thompson* v. *County School Board of Arlington County*, 144 F. Supp. 239 (E. D. Va., 1956); *School Board of City of Newport News, Va.* v. *Atkins*, 246 F. 2d 325 (1957).

Counsel for plaintiffs further contend that even if the Assignment and Enrollment of Pupils Act is constitutional, it need not be complied with in this case because the provisions of the act are being unconstitutionally applied. This argument is completely untenable in view of the fact

that there is no allegation that any of the plaintiffs ever sought to comply with the provisions of the act. Not until each of the plaintiffs has applied to the Board of Education of Montgomery County as individuals, and not as a class, for reassignment, and have failed to be given the relief sought, should the courts be asked to interfere in school administration. *Carson* v. *Warlick, Supra.*

The requirement for plaintiffs in suits of this type to exhaust administrative remedies before seeking injunctive relief in the federal court is discussed at some length in the case of *Joseph Hiram Holt, Jr.* v. *Raleigh City Board of Education*, —— F. Supp. —— (M. D. N. C., 1958), decided on August 29, 1958. Reference is made to that case for further discussion of my views on this subject.

In view of the plain holding of the Court of Appeals for this circuit in the *Carson* cases, and in view of the fact that the plaintiffs do not allege that they have exhausted, or have even attempted to exhaust, their administrative remedies under the North Carolina Assignment and Enrollment of Pupils Act, I conclude that the plaintiffs have failed to state a claim against the defendants in either their original complaint or their proposed amended and supplemental complaint, on which relief can be granted, and that this action should be dismissed.

A judgment will be entered in conformity with this opinion.

This the 12th day of September, 1958.

/s/ EDWIN M. STANLEY,
United States District Judge

UNITED STATES COURT OF APPEALS

For the Fourth Circuit

No. 7802.

• • • • •

Before Sobeloff, Chief Judge, and Soper and Haynsworth, Circuit Judges.

• • • • •

Per Curiam:

The parents of a number of Negro children in Montgomery County, North Carolina, brought this suit to secure an injunction against the Superintendent of Schools and the County Board of Education, directing the defendants to present a plan of desegregation of the races in the schools and forbidding them to assign Negroes to particular schools because of their race. The complaint was filed on July 29, 1955, as a class action by thirteen adults personally and as the next friends of the forty-five minor plaintiffs, all of whom are Negroes. The defendants filed an answer on September 22, 1955, alleging that the plaintiffs had failed to exhaust the administrative remedies provided by the State, in that they did not comply with the statutes of the State which regulate the assignment and enrollment of pupils in the public schools. On this account, the defendants moved the court to dismiss the suit, and the District Judge after hearing granted the motion.

We are of the opinion that the present case is ruled by the prior decisions of this court in *Carson* v. *Board of Education*, 227 F.2d 789, and *Carson* v. *Warlick*, 238 F.2d 724. In the first of these cases the following statement was made in the per curiam opinion (page 790):

> "* * * The Act of March 30, 1955,* entitled 'An Act to Provide for the Enrollment of Pupils in Public Schools', being chapter 366 of the Public Laws of North Carolina of the Session of 1955, provides for enrollment by the county and city boards of education of school children applying for admission to schools, and authorizes the boards to adopt rules and regulations with regard thereto. It further provides for application to and prompt hearing by the board in the case of any child whose admission to any public school within the county or city administrative unit has been denied, with right of appeal therefrom to the Superior Court of the county and thence to the Supreme Court of the state. An administrative remedy is thus provided by state law for persons who feel that they have not been assigned to the schools that they are entitled to attend; and it is well settled that the courts of the United States will not grant injunctive relief until administrative remedies have been exhausted. * * *"

This case was brought to this court a second time, in *Carson* v. *Warlick*, supra, after the Supreme Court of North Carolina in *Joiner* v. *McDowell County Board of Education*, 244 N.C. 164, had interpreted the Pupil Placement Act of the State, and had held that the factors involved in the selection of appropriate schools for a child

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* This act in its present form is found in the General Statutes of North Carolina, Chapter 115, Article 21, Secs. 115-176 to 115-179. Changes of assignment are regulated by Sec. 115-178.

necessitated the consideration of the application of any child or children individually and not en masse. It was shown to this court that the plaintiffs, in the action in the court below, had not attempted to comply with the provisions of the statute as so interpreted but had merely inquired of the Secretary of the Board of Education what steps were being taken for the admission of colored children to the schools of the town of Old Fort, and that the school authorities in reply merely pointed out that no Negro pupil had made application to attend the school and that the board therefore had no cause to take any action in that connection. We therefore reaffirmed our previous decision and held that the plaintiffs were not entitled to relief because they had not exhausted their administrative remedies. In the course of the opinion Judge Parker said (238 F.2d at 728-729):

> "Somebody must enroll the pupils in the schools. They cannot enroll themselves; and we can think of no one better qualified to undertake the task than the officials of the schools and the school boards having the schools in charge. It is to be presumed that these will obey the law, observe the standards prescribed by the legislature, and avoid the discrimination on account of race which the Constitution forbids. Not until they have been applied to and have failed to give relief should the courts be asked to interfere in school administration. As said by the Supreme Court in *Brown* v. *Board of Education*, 349 U.S. 294, 299,
>
> > * * * * School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles".

"It is argued that the statute does not provide an adequate administrative remedy because it is said that it provides for appeals to the Superior and Supreme Courts of the State and that these will consume so much time that the proceedings for admission to a school term will become moot before they can be completed. It is clear, however, that the appeals to the courts which the statute provides are judicial, not administrative remedies and that, after administrative remedies before the school boards have been exhausted, judicial remedies for denial of constitutional rights may be pursued at once in the federal courts without pursuing state court remedies. Lane v. Wilson, 307 U.S. 268, 274. Furthermore, if administrative remedies before a school board have been exhausted, relief may be sought in the federal courts on the basis laid therefor by application to the board, notwithstanding time that may have elapsed while such application was pending. Applicants here are not entitled to relief because of failure to exhaust what are unquestionably administrative remedies before the board.

"There is no question as to the right of these school children to be admitted to the schools of North Carolina without discrimination on the ground of race. They are admitted, however, as individuals, not as a class or group; and it is as individuals that their rights under the Constitution are asserted. Henderson v. United States, 339 U.S. 816. It is the state school authorities who must pass in the first instance on their right to be admitted to any particular school and the Supreme Court of North Carolina has ruled that in the performance of this duty the school board must pass upon individual applications made individually to the board. The federal courts should not condone dilatory tactics or evasion on the part of state officials

in according to citizens of the United States their rights under the Constitution, whether with respect to school attendance or any other matter; but it is for the state to prescribe the administrative procedure to be followed so long as this does not violate constitutional requirements, and we see no such violation in the procedure here required. * * *"

We are advertent to the circumstances upon which the plaintiffs rest their case, namely, that the County Board has taken no steps to put an end to the planned segregation of the pupils in the public schools of the county but, on the contrary, in 1955 and subsequent years, resolved that the practices of enrollment and assignment of pupils for the ensuing year should be similar to those in use in the current year. If there were no remedy for such inaction, the federal court might well make use of its injunctive power to enjoin the violation of the constitutional rights of the plaintiffs but, as we have seen, the State statutes give to the parents of any child dissatisfied with the school to which he is assigned the right to make application for a transfer and the right to be heard on the question by the Board. If after the hearing and final decision he is not satisfied, and can show that he has been discriminated against because of his race, he may then apply to the federal court for relief. In the pending case, however, that course was not taken, although it was clearly outlined in our two prior decisions, and the decision of the District Court in dismissing the case was therefore correct. This conclusion does not mean that there must be a separate suit for each child on whose behalf it is claimed that an application for reassignment has been improperly denied. There can be no objection to the joining of a number of applicants in the same suit as has been done in other cases. The County Board of Education, however,

is entitled under the North Carolina statute to consider each application on its individual merits and if this is done without unnecessary delay and with scrupulous observance of individual constitutional rights, there will be no just cause for complaint.

The appellants also raise the point that the District Judge was wrong in rejecting the motion of the plaintiffs to amend the bill of complaint by joining the State Board of Education and the Superintendent of Public Instruction of the State as parties defendant. It is pointed out that the State Board has general control of the supervision and administration of the fiscal affairs of the public schools and other important powers conferred by the General Statutes, secs. 115-4, 115-11 and 115-283. The provisions of sec. 115-178 of the Pupil Placement Act, however, places the authority in the County boards of education to make the assignments and enrollment of pupils and contains no direction for the participation of the State Board of Education in these matters. We therefore think that nothing would be gained by joining these officials as additional defendants and that the judge was correct in denying the motion to amend the complaint.

Affirmed.

Decree

Filed and Entered March 19, 1959.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 7802.

HELEN COVINGTON, personally and as mother and next friend of CORNETT COVINGTON, *et al.*,

Appellants,

—vs.—

J. S. EDWARDS, Superintendent of Schools of Montgomery County, North Carolina, E. R. WALLACE, D. C. EWING, HAROLD A. SCOTT, JAMES R. BURT and JAMES INGRAM, members of the Montgomery County Board of Education,

Appellees.

APPEAL FROM the United States District Court for the Middle District of North Carolina.

THIS CAUSE came on to be heard on the record from the United States District Court for the Middle District of North Carolina, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

March 19, 1959.

SIMON E. SOBELOFF
Chief Judge, Fourth Circuit.

FILE COPY

Office-Supreme Court, U.S.
FILED
AUG 7 1959
JAMES R. BROWNING, Clerk

Supreme Court of The United States

October Term, 1959

No. 222

HELEN COVINGTON, et al.,

Petitioners,

vs.

J. S. EDWARDS, SUPERINTENDENT OF SCHOOLS OF MONTGOMERY COUNTY, NORTH CAROLINA, et al.,

Respondents.

BRIEF OF RESPONDENTS, MEMBERS OF THE NORTH CAROLINA STATE BOARD OF EDUCATION, IN OPPOSITON TO PETITION FOR WRIT OF CERTIORARI.

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Justice Building
Raleigh, North Carolina

Counsel for the Respondents, Members of the North Carolina State Board of Education

Supreme Court of The United States

October Term, 1959

No. 222

HELEN COVINGTON, et al.,

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vs.

J. S. EDWARDS, SUPERINTENDENT OF SCHOOLS OF MONTGOMERY COUNTY, NORTH CAROLINA, et al.,

Respondents.

BRIEF OF RESPONDENTS, MEMBERS OF THE NORTH CAROLINA STATE BOARD OF EDUCATION, IN OPPOSITON TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE ON BEHALF OF RESPONDENTS, MEMBERS OF THE NORTH CAROLINA STATE BOARD OF EDUCATION.

In order to understand the position of the Respondents, Members of the North Carolina State Board of Education, it is necessary to state the facts from the standpoint of these Respondents.

This action was originally instituted in the District Court of the United States for the Middle District of North Carolina by these Petitioners against J. S. Edwards, Superintendent of Schools of Montgomery County, North Carolina, and against the Members of the Montgomery County Board of Education. It should be emphasized that these Respondents, Members of the North Carolina State Board of Education, were not made parties defendant (R-5a, Appendix Appellants' Brief CCA). It should further be noted that the Petition mentioned by the Petitioners on p. 3 of the Petition filed before

this Court was filed on September 7, 1954, and was directed to the Superintendent and Board of School Trustees of the Montgomery County, North Carolina, Public Schools, and was not directed to these Respondents.

On p. 36a of the Appendix to Apellants' Brief filed in the Circuit Court of Appeals for the Fourth Circuit will be found the Motion of the Petitioners for Leave to File Amended and Supplemental Complaint and Add Parties Defendant, and on p. 39a of the Appendix to Appellants' Brief filed in the Circuit Court of Appeals for the Fourth Circuit will be found the Proposed Amended and Supplemental Complaint.

There is filed as an Appendix to this Brief the Special Appearance of the State of North Carolina in behalf of the Members of the State Board of Education in Opposition to Motion of Petitioners to File Supplemental Complaint and Make Additional Parties Defendant (see Appendix this Brief, p. 4).

ARGUMENT

If the Court will refer to p. 5 of this Petition for Writ of Certiorari now pending before this Court it will be seen that the Petitioners say in Footnote No. 4 the following:

> "The supplemental complaint would have made state education officials parties defendant. That aspect of the case is not brought here by this petition."

Reference is made to the Opinion of the District Judge of the United States District Court, beginning on p. 24 of the Appendix to this Petition and especially on p. 26, for the holding that the Respondents, Members of the North Carolina State Board of Education, were not necessary or proper parties. Reference is made to the Judgment of the District Court of the United States on p. 55a of Appendix to Appellants' Brief CCA for the Decree of Dismissal; and reference is further made to the Opinion of the United States Court of Appeals for the Fourth Circuit on pp. 29, 34, for the decision of that Court showing that the Respondents, Members of the North Caro-

lina State Board of Education, should not be joined in this action.

This statement is, therefore, filed with this Court for the purpose of emphasizing that the Petitioners claim no relief as against these Respondents. This statement would not have been filed except for the fact that the Petitioners served copy of this Petition upon the Attorney General.

Respectfully submitted,

MALCOLM B. SEAWELL
Attorney General of North Carolina

RALPH MOODY
Assistant Attorney General

Justice Building
Raleigh, North Carolina

Counsel for the Respondents, Members of the North Carolina State Board of Education.

APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

Rockingham Division

HELEN COVINGTON, ET ALS, Plaintiffs, vs. J. S. EDWARDS, SUPERINTENDENT OF SCHOOLS OF MONTGOMERY COUNTY, AND BOARD OF EDUCATION OF MONTGOMERY COUNTY, Defendants.	CIVIL NO. 323-R

SPECIAL APPEARANCE OF STATE OF NORTH CAROLINA IN BEHALF OF STATE BOARD OF EDUCATION AND STATE SUPERINTENDENT OF PUBLIC INSTRUCTION IN OPPOSITION TO MOTION OF PLAINTIFFS TO FILE SUPPLEMENTAL COMPLAINT AND MAKE ADDITIONAL PARTIES DEFENDANTS.

To the Honorable, the Judge of the District Court of the United States for the Middle District of North Carolina:

The State of North Carolina, appearing by George B. Patton, Attorney General of North Carolina, in behalf of the State Board of Education and the State Superintendent of Public Instruction, said appearance being especially made for the purpose of opposing the proposed Motion of Plaintiffs to file Supplemental Complaint and to make additional parties defendants, as shown in said Motion filed herein, the same not being a general appearance, Now moves the Court that said Motion filed September 13th, 1956, be disallowed and dismissed for the reasons following:

(1) That this action was brought by the Plaintiffs against the Board of Education of Montgomery County and the Sup-

erintendent of Schools of Montgomery County and all pleadings have been duly filed and appear in the record of the case; that as against the above Defendants the Plaintiffs seek an interlocutory and permanent injunction declaring Article IX, Sec. 2, of the Constitution of North Carolina, and any customs, practices and usages requiring segregation in public schools to be declared to be in violation of the 14th Amendment; that Defendants be required to present a plan of desegregation for Montgomery County, and restraining and enjoining any further segregation as to Plaintiffs and all others in the same situation.

(2) That it is alleged in the Plaintiffs' Motion, now under consideration, that subsequent to the filing of the Complaint and Amendments Article IX of the Constitution of North Carolina has been amended so as to authorize education expense grants and to authorize local option for the purpose of suspending the operation of public schools; it is further alleged that the General Assembly of North Carolina has rewritten and amended Chapter 115 of the General Statutes of North Carolina, and especially Articles 21, 34, 35 of said Chapter 115, relating to the assignment and enrollment of pupils in the public schools, providing local option for the suspension of the public schools, and providing education expense grants for children attending non-public schools; it is also alleged in said Motion (a) that because of these Constitutional and Statutory changes the cause of action is materially affected and in order to prevent a multiplicity of suits it is necessary to set forth these changes in the pleadings; and (b) that the State Board of Education and the State Superintendent of Public Instruction have now become necessary parties.

(3) That the State Board of Education is an agency of the State of North Carolina and exercises such powers and duties as are set forth in Article 2 of Chapter 115 of the General Statutes (Cumulative Supplement of 1957); that the State Superintendent of Public Instruction is a Constitutional Officer of the State of North Carolina and exercises such powers and duties as are set forth in Article 3 of Chapter 115 of the General Statutes (Cumulative Supplement of 1957).

(4) That the State Board of Education and the State Superintendent of Public Instruction are not indispensable parties defendants to this action since they do not belong in the class of parties defendants without whom the action cannot proceed, nor do they have such an interest in the subject-matter of the controversy that final decree cannot be made without affecting their interests; that the State Board of Education and the State Superintendent of Public Instruction are not necessary parties defendants, nor are they essential parties defendants, nor are they desirable parties defendants, since they do not have any interest in this controversy nor do they even have a separable interest which would be directly or indirectly affected by any decree entered in this action; that the Plaintiffs in this action can have complete relief, if they are entitled to any relief at all, against the persons, officials and agencies which are already parties defendants in this action; that if the Plaintiffs are entitled to any relief at all they can obtain a decree from the Court which will be full, complete, adequate, valid and final and without any possible fear that said decree will subsequently be rendered nugatory by any action on the part of the State Board of Education or the State Superintendent of Public Instruction.

(5) That the State Board of Education and the State Superintendent of Public Instruction do not even have the status of proper parties or formal parties in the subject-matter of this action; that these proposed parties defendants not only do not have any interest in the controversy between the immediate litigants, but they do not have such an interest in the subject-matter that can even be conveniently adjudicated in this action for the purpose of preventing further or future litigation.

(6) That the allegations in the proposed Supplemental Complaint, attached to the Motion here under consideration, cannot displace, alter or change the authority, lack of authority, rights, duties and legal relations of the parties to this action or the proposed parties defendants as defined and fixed by valid constitutional provisions and statutes of the State of North Carolina; that in view of controlling, valid and applic-

able constitutional provisions and the statutes of the State of North Carolina the allegations of the proposed Supplemental Complaint do not and cannot legally state any cause of action against the State Board of Education and the State Superintendent of Public Instruction, the proposed additional parties defendants under the Motion, for that: (1) the proposed additional parties defendants are not by law charged with any duties with respect to the local option statutory plan of closing or suspending the operation of public schools (Article 34 of Chapter 115 of the General Statutes—Cumulative Supplement of 1957), nor do they have any lawful authority or control over the administration of said plan or statute; (2) that Plaintiffs do not allege in their proposed Supplemental Complaint that any election has been held or proposed or called under the provisions of said statute, or that any administration of said statute or article has been made or is about to be made which in anywise results in any discriminatory or any unconstitutional application to the Plaintiffs or their rights; (3) that none of the Plaintiffs, therefore, either individually or as a group, belong to any class of persons who have in anywise been discriminated against or deprived of any rights in an unconstitutional manner under such statute, or acting under color of same, or by reason of any administration of same, and, therefore, Plaintiffs do not have sufficient status and are not in a position to attack the constitutionality of said article or statute; (4) that as to Article 35 of Chapter 115 of the General Statutes, Cumulative Supplement of 1957, dealing with Education Expense Grants, there is no allegation in the Complaint that the Plaintiffs have been discriminated against in any manner or deprived of any constitutional rights by reason of said article or statute or any administration of same, and, in fact, no grant of funds has yet ever been made to any person or individual by reason of said article or statute; the Plaintiffs, therefore, do not belong to any class or group of persons affected by such statute and are not in any position and have no legal status to attack the constitutionality of said statute; (5) that the State Superintendent of Public Instruction is not charged with any administration of education expense grants and has no duties in regard to same, and the State Board of Education does not

determine the eligibility of any child or pupil for any grant, being charged only with the duty of determining the maximum amount of the grant to be made available to each child; (6) that as to the assignment and enrollment of pupils provided by Article 21 of Chapter 115 of the General Statutes (Cumulative Supplement of 1957) the said article has been declared to be constitutional on its face by the United States Court of Appeals for the Fourth Circuit, and petition, or application, for certiorari made to the Supreme Court of the United States has been denied; that Plaintiffs never have at any time complied with said Article 21 and there has been no administration or application under the provision of said statute to these Plaintiffs, and, therefore, Plaintiffs are not in a position and do not have such legal status as is required for the purpose of attacking the constitutionality of the said statute, and Plaintiffs have not been discriminated against in an unconstitutional manner nor have they been deprived of any constitutional rights flowing from or under the provisions of said Article 21; (7) that the State Board of Education and the State Superintendent of Public Instruction are not charged with any duties, have no authority and do not exercise any control whatsoever with respect to the administration of said Article 21 and have never exercised or assumed the right to exercise any duties or authority with respect thereto, but, to the contrary, said Article 21 is administered by other officials and bodies exercising rights directly conferred by the General Assembly of North Carolina; (8) that the allegations of the Supplemental Complaint proposed to be filed by virtue of the Motion now under consideration does not state any cause of action or any legal grounds or foundation for a cause of action against the State Board of Education or against the State Superintendent of Public Instruction, either one or both.

(7) That this appearance is made by the Attorney General of North Carolina in behalf of the State Board of Education and the State Superintendent of Public Instruction solely for the purpose of resisting Plaintiffs' Motion to file supplemental Complaint and make additional parties defendants.

WHEREFORE, the Attorney General of North Carolina moves the Court that the Plaintiffs' Motion be disallowed and dismissed and that the State Board of Education and the State Superintendent of Public Instruction shall not be made parties defendants in this action.

GEORGE B. PATTON
Attorney General of North Carolina

RALPH MOODY
Assistant Attorney General

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AUG 17 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 222.

HELEN COVINGTON, ET AL., *Petitioners*,

v.

J. S. EDWARDS, Superintendent of Schools of Montgomery County, North Carolina, et al., *Respondents*.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

No further statement of the proceedings in the lower courts seems necessary in view of the full and complete recitations contained in their respective Opinions. However, Respondents respectfully set forth below some general comment concerning the "Statement" in Petitioners' brief (Pet. pp. 3-6).

Petitioners emphasize in their "Statement" that there exists in Montgomery County "board imposed

segregation" and "a system of planned segregation". The District Court considered Petitioners' argument based on the proposition that the length of time elapsing since *Brown* v. *Board of Education*, 347 U.S. 483; 74 S.Ct. 686, 98 L.ed. 873 (1954), without Respondent acting to desegregate its schools, stated a cause of action for which an injunction should be granted. (Pet. Appdx., p. 27). The Circuit Court said it was advertent to Petitioners' contention that no steps had been taken to put an end to planned segregation but that enrollment and assignment of pupils for the current year should be similar to those of past years. (Pet. Appdx., p. 33). It seems clear to Respondents that the lower Courts did not find that there was a "system of planned segregation" or "board imposed segregation". The lower Courts presumed that the Respondents would follow the laws of North Carolina which abolished segregation by law, the decisions of the Supreme Court of North Carolina invalidating the State Constitutional provision establishing segregated schools (*Constantine* v. *Anson County*, 234 N.C. 221, 93 S.E. 2d 163), and the various decisions in the Fourth Circuit concerning State statutes bearing on this subject. (See *Carson* v. *Board of Education of McDowell County*, 227 F.2d 789; *Carson* v. *Warlick*, 238 F.2d 724, Cert. den. 353 U.S. 910, 1 L.ed. 2d 664; *Briggs* v. *Elliott*, 132 F.Supp. 776; *Hood* v. *Board of Trustees*, 232 F.2d 626, Cert. Den. 352 U.S. 870.) Thus, Petitioners "Statement of the Case" is not only misleading in this regard, but they "bottom" their case on a proposition which has been clearly negatived not only by the lower Courts in the instant action but by the many Circuit Court decisions arising in this Circuit since *Brown* v. *The Board*, *supra*.

ARGUMENT

The Court of Appeals Below Did Not Err in Affirming the Judgment of the District Court Dismissing Petitioners' Complaint for Failure to State a Claim Against the Respondents for Which Relief Could be Granted.

The District Court said in its Opinion (Pet. App., pp. 26-27):

> "In regard to the first issue, it should be stated at the outset that the plaintiffs have not alleged in their original complaint, or in their proposed amended and supplemental complaint, that there has been any exhaustion of their administrative remedy as provided for in Section 115-176 through 115-178, General Statutes of North Carolina, known as the Enrollment and Assignment of Pupils Act. Indeed, in their brief, plaintiffs admit that they did not proceed under this act, and contend that exhaustion of administrative remedies provided for by the Act are unnecessary."

Petitioners argue at page 9 and page 12 of their Brief that the Pupil Assignment Act is irrelevant to the present issue and that the doctrine of the exhaustion of administrative remedies has no application in this case. That the Fourth Circuit has erroneously upheld the doctrine of exhaustion of administrative remedies under the North Carolina Pupil Assignment Act. The District Court succinctly states Respondents' contention as to Petitioners' attempt to circumvent the plain requirements for exhausting their administrative remedies in its Opinion (Pet. Appdx., p. 27):

> "Counsel for the plaintiffs make this contention in face of the decisions rendered by the Court of appeals for this circuit in *Carson* v. *Board of Education of McDowell County*, Cir. 4, 227 F.2d 789 (1955), and *Carson* v. *Warlick*, Cir. 4, 238 F.2d

724, certiorari denied 353 U.S. 910, 77 S.Ct. 665, 1 L.Ed. 2d 664.

"They advance the argument that the presumption relied on in *Carson* v. *Warlick*, Supra, that school officials 'will obey the law, observe the standards prescribed by the legislature, and avoid the discrimination on account of race which the Constitution forbids' is not valid because of the length of time that has passed since the decision of the supreme Court of the United States in *Brown* v. *Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), without the defendant's acting to desegregate the public schools of Montgomery County. The fallacy of this argument is readily seen when one reflects on what the Supreme Court actually held in the Brown case. As has been repeatedly stated, the Brown case does not require integration, but only holds that states can no longer deny to anyone the right to attend a school of their choice on account of race or color. *Briggs* v. *Elliott*, 132 F.Supp. 776 (E.D.S.C., 1955); *Thompson* v. *County School Board of Arlington County*, 144 F.Supp. 239 (E.D. Va., 1956); *School Board of City of Newport News, Va.* v. *Atkins*, 246 F.2d 325 (1957)."

The Court of Appeals for the Fourth Circuit in its Opinion clearly sets forth Petitioners' remedy under the North Carolina Pupil Assignment Act (Pet. Appdx., p. 33):

"... If there were no remedy for such inaction, the federal court might well make use of its injunctive power to enjoin the violation of the constitutional rights of the plaintiffs but, as we have seen, the State statutes give to the parents of any child dissatisfied with the school to which he is assigned the right to be heard on the question by the Board. If after the hearing and final decision he is not

> satisfied, and can show that he has been discriminated against because of his race, he may then apply to the federal court for relief. In the pending case, however, that course was not taken, although it was clearly outlined in our two prior decisions, and the decision of the District Court in dismissing the case was therefore correct. This conclusion does not mean that there must be a separate suit for each child on whose behalf it is claimed that an application for reassignment has been improperly denied. There can be no objection to the joining of a number of applicants in the same suit as has been done in other cases. The County Board of Education, however, is entitled under the North Carolina statute to consider each application on its individual merits and if this is done without unnecessary delay and with scrupulous observance of individual constitutional rights, there will be no just cause for complaint."

Its seems more than clear that the Petitioners are not interested in obtaining a change of assignment from the schools in which they are presently enrolled, but seek to circumvent and vitiate the North Carolina Pupil Assignment Act. More than three years ago, on April 7, 1956, in the instant action, the District Court made it clear that the Board could not compel segregation in the public schools (*Covington* v. *Montgomery County School Board*, 139 F.Supp. 163):

> "The validity of that part of the North Carolina Constitution requiring separate schools for the two races is no longer the subject for legal controversy. Nor is any statute—State or local—or order of a board compelling segregation in the public schools, a legal controversy now."

Petitioners' case, simply stated, is that strict compliance with *Brown* v. *The Board*, *supra*, would require

the District Courts in North Carolina to enjoin the 174 boards of education to ignore the North Carolina Pupil Assignment Law and present plans of desegregation or general reshuffling of pupils within their units. The late Judge Parker of the Court of Appeals for the Fourth Circuit nullified this theory in *Briggs* v. *Elliott*, 132 F.Supp. 776 which has been quoted with approval many times by the federal judiciary in this country. His opinion read in part as follows:

> "Having said this, it is important that we point out exactly what the Supreme Court has decided and what it has not decided in this case. It has not decided that the federal courts are to take over or regulate the public schools of the states. It has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains. This, under the decision of the Supreme Court, the state may not do directly or indirectly; but if the schools which it maintains are open to children of all races, no violation of the Constitution is involved even though the children of different races voluntarily attend different schools, as they attend different churches. Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation. The Fourteenth Amendment is a limitation upon the exercise of power by the state or state agencies, not a limitation upon the freedom of the individuals.

> "The Supreme Court has pointed out that the solution to the problem in accord with its decisions is the primary responsibility of school authorities and that the function of the courts is to determine whether action of the school authorities constitutes 'good faith implementation of the governing constitutional principles'. . ."

In *Hood* v. *Board of Trustees of Sumpter County School District*, 232 F.2d 627, cert. den., 352 U.S. 870, 1 L.Ed. 2d 76, the Circuit Court affirmed the District Court denial of plaintiff's request for injunction against alleged denial of admission to public schools solely on the basis of race or color on the ground that plaintiffs had not exhausted administrative remedies provided by the South Carolina statute. The Court cited *Carson* v. *Board of Education of McDowell County*, 227 F.2d 789, as authority for the per curiam decision. Thus, as early as October 15, 1956, the Supreme Court of the United States had refused to grant certiorari when a federal court, prior to consideration of a request for injunction of a school board to desegregate the schools, had required the moving parties to exhaust state administrative remedies.

While Respondents are cognizant of the fact that this Court is thoroughly familiar with the Carson cases arising in this jurisdiction, they feel that the compelling language and force contained within the decisions should be set forth in this brief. Respondents therefore call the Court's attention to the Carson cases as follows:

Carson v. *McDowell County Board of Education*, 227 F.2d 789:

> "In further consideration of the case, however, the District Judge should give consideration not

merely to the decision of the Supreme Court but also to subsequent legislation of the State of North Carolina providing an administrative remedy for persons who feel aggrieved with respect to their enrollment in the public schools of the State. The Act of March 30, 1955, entitled 'An Act to Provide for the Enrollment of Pupils in Public Schools', being chapter 366 of the Public Laws of North Carolina of the Session of 1955, provides for enrollment by the county and city boards of education of school children applying for admission to schools, and authorizes the boards to adopt rules and regulations with regard thereto. It further provides for application to and prompt hearing by the board in any case of any child whose admission to any public school within the county or city administrative unit has been denied, with right of appeal therefrom to the Superior Court of the county and thence to the Supreme Court of the State. An administrative remedy is thus provided by state law for persons who feel that they have not been assigned to the schools that they are entitled to attend; and it is well settled that the courts of the United States will not grant injunctive relief until administrative remedies have been exhausted. *Myers* v. *Bethlehem Corp.*, 303 U.S. 41, 51; *Natural Gas* v. *Slattery*, 302 U.S. 300, 310-311; *Hegeman Farms Corp.* v. *Baldwin*, 293 U.S. 163, 172; *United States* v. *Illinois Central R. Co.*, 291 U.S. 457, 463; *Peterson* v. *Bryan*, 290 U.S. 570, 575; *Porter* v. *Investor's Syndicate*, 286 U.S. 461; *Matthews* v. *Rogers*, 284 U.S. 521, 535-526; *Prentis* v. *A. C. L. R. Co.*, 211 U.S. 210.

"This rule is especially applicable to a case such as this, where injunction is asked against state or county officers with respect to the control of schools maintained and supported by the state. The federal courts manifestly cannot operate the schools. All that they have power to do in the premises is to enjoin violation of constitutional

rights in the operation of schools by state authorities. Where the state law provides adequate administrative procedure for the protection of such rights, the federal courts manifestly should not interfere with the operation of the schools until such administrative procedure has been exhausted and the intervention of the federal courts is shown to be necessary. As said by Mr. Justice Stone in *Matthews* v. *Rodgers, supra* (284 U.S. 525): 'The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal court, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be presrved without it.' Interference by injunction with the schools of a state is as grave a matter as interfering with its fiscal operations and should not be resorted to 'where the asserted federal right may be preserved without it.'"

Carson v. *Warlick*, 238 F.2d 724, cert. den. 353 U.S. 919:

"While the presentation of the children at the Old Fort School appears to have been sufficient as the first step in the administrative procedure provided by statute the prosecution of a joint or class proceeding before the school board was not sufficient under the North Carolina statute as the Supreme Court of North Carolina pointed out in its opinion; and not until the administrative procedure before the board had been followed in accordance with the interpretation placed upon the statute by that court would applicants be in position to say that administrative remedies had been exhausted.

"It is argued that the Pupil Enrollment Act is unconstitutional; but we cannot hold that that statute is unconstitutional upon its face and the question as to whether it has been unconstitution-

ally applied is not before us, as the administrative remedy which it provided has not been invoked. It is argued that it is unconstitutional on its face in that it vests discretion in an administrative body without prescribing adequate standards for the exercise of the discretion. The standards are set forth in the second section of that act, G. S. 115-177, and require the enrollment to be made 'So as to provide for the orderly and efficient administration of such public schools, the effective instruction of the pupils enrolled, and the health, safety and general welfare of such pupils'. Surely the standards thus prescribed are not on their face insufficient to sustain the exercise of the administrative power conferred. As said in *Opp Cotton Mills* v. *Administrator of the Wage and Hour Division of the Department of Labor*, 312 U.S. 126, 145; 'The essentials of the legislative function are the determination of the legislative policy and its formulation as a rule of conduct. Those essentials are preserved when Congress specifies the basic conclusions of fact upon ascertainment of which, from relevent data by a designated administrative agency, it ordains that its statutory command is to be effective.' The authority given the boards is 'of a fact-finding and administrative nature, and hence is lawfully conferred'. *Sproles* v. *Binford*, 286 U.S. 374. See also *Douglas* v. *Noble*, 261 U.S. 165, 169-170; *Holt* v. *Geiger Jones Co.*, 242 U.S. 539, 553-554; *Mutual Film Corp.* v. *Hodges*, 236 U.S. 230, 245-246; *Red "C" Oil Mfg. Co.* v. *North Carolina*, 222 U.S. 380, 394.

"Somebody must enroll the pupils in the schools. They cannot enroll themselves; and we can think of no one better qualified to undertake the task than the officials of the schools and the school boards having the schools in charge. It is to be presumed that these will obey the law, observe the standards prescribed by the legislature, and avoid the discrimination on account of race which the

> Constitution forbids. Not until they have been applied to and have failed to give relief should the courts be asked to interfere in school administration. As said by the Supreme Court in *Brown, et al.* v. *Board of Education, et al.* 349 U.S. 294, 299: 'School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles'."

The rule that requires Petitioners to exhaust their administrative remedies does not except cases where parties applying for relief allege the violation of rights secured by the Constitution. This Court said in *Vandalia R. Co.* v. *Public Service Co.*, 242 U.S. 255, 261, 61 L.Ed. 276, 286:

> "The general rule is that one aggrieved by the rulings of such an administrative tribunal may not complain that the Constitution of the United States has been violated if he has not availed himself of the remedies prescribed by the state law for a rectification of such rulings. *Bradley* v. *Richmond*, 227 U.S. 477, 485, 57 L.Ed. 603, 606'."

The petitioners contend that: ". . . The statute does not afford the administrative means capable of furnishing the relief to which the Petitioners are entitled; it neither requires segregation nor affords a means of eliminating segregation." (Pet., p. 9) Respondents contend that the administrative means capable of furnishing relief to Petitioners is embodied in the Pupil Assignment Act. As the District Court said ". . . The presumption relied on in *Carson* v. *Warlick*, *supra*, that school officials obey the law, observed the stand-

ards prescribed by the legislature, and avoid the discrimination on account of race which the Constitution forbids'" is a proper one and the attack made on this presumption is a fallacious argument when one reflects on what the Supreme Court held in the *Brown* case. A decision contrary to that of the District and Circuit Courts would in effect go far towards nullifying the very principle of the administrative remedies.

Petitioners in their brief argue that they pursued their administrative remedies by a petition asking the Board to prepare and pursue a plan of general desegregation (Pet., p. 10). Thus, the Petitioners at one and the same time urge on this Court that they may ignore the Pupil Assignment Act and then urge upon the Court that they have pursued their remedies under the Act. Yet, it is clear from the pleadings that the plaintiffs did not allege in either their original complaint or in their proposed amended and supplemental complaint that they had exhausted their administrative remedies. (Pet. Appdx., p. 26) Even if Respondents are not following the mandate of *Brown* v. *The Board, supra*, which is denied, the procedure for bringing this to the Federal judiciary's attention has not been invoked. If one were to petition a District Court for benefits under the Social Security Act and allege entitlement to same, the District Court would hardly have jurisdiction nor would a cause of action be stated unless full compliance with the administrative procedures as set out in an act of Congress were fully and properly exhausted. This is a fundamental principle of administrative law which the Petitioners seek to circumvent in the instant action despite the clear procedures outlined in the North Carolina Pupil Assignment Act. Any opinion holding to the contrary would

vitiate the great body of administrative law that is responsible for carrying out the multifarious duties imposed by federal, state and local statutes.

Now, turning briefly to Petitioners' reasons for granting certiorari based on a conflict of decisions with other Circuit Courts, Respondents urge that there are in fact no conflicts existing and, even if given such an interpretation, they are clearly distinguishable upon the facts in each case.

Attention of the Court is directed by the Petitioners to decisions rendered by the Court of Appeals for the Fifth Circuit. The most exhaustive decision in that Circuit was rendered in *Shuttlesworth* v. *Birmingham Board of Education*, 162 F. Supp. 372, Aff'd. 3 L.Ed.2d 145 (1958), in a decision handed down by Judge Rives for the three judge District Court. Judge Rives noted the difference in the Louisiana and Virginia situations wherein state law either required segregated schools or withdrawal of funds for them to operate which were coupled with an assignment act. Judge Rives states that the North Carolina Pupil Enrollment Act contained adequate standards and cited *Carson* v. *Warlick*, *supra*, as authority for same. In the body of the decision the Court quotes from earlier decisions as follows:

> "The equal protection and due process clauses of the Fourteenth Amendment do not affirmatively command integration, but they do forbid any state action requiring segregation on account of the race or color of children in the public schools. *Avery* v. *Wichita Falls Independent School District*, 5 Cir., 1957, 241 F.2d, 230, 233. Pupils may, of course, be separated according to their degree of advancement or retardation, their ability to learn, on account of their health, or for any other legitimate reason,

but each child is entitled to be treated as an individual without regard to his race or color. *Borders v. Rippey*, 5 Cir., 1957, 247 F.2d 268, 271."

Although Petitioners rely on a conflict between the Fourth and Fifth Circuits, the concluding language of Judge Rives in the Shuttlesworth case seem clearly to nullify this proposition. Judge Rives' conclusion is as follows:

"The grounds upon which the Louisiana and Virginia Acts were declared unconstitutional on their face have been heretofore stated at some length. See ante pages 6, 7, and 8. Enough has also been said to show that none of those grounds are applicable to the Alabama Act. The legal situation in Alabama is more analogous to that in North Carolina, where the Pupil Enrollment Act was ruled to be not unconstitutional on its face, in an opinion by the late great Chief Judge Parker, from which we quote:

'Somebody must enroll the pupils in the schools. They cannot enroll themselves; and we can think of no one better qualified to undertake the task than the officials of the schools and the school boards having the schools in charge. It is to be presumed that these will obey the law, observe the standards prescribed by the legislature, and avoid the discrimination on account of race which the Constitution forbids. Not until they have been applied to and have failed to give relief should the courts be asked to interfere in school administration. As said by the Supreme Court in *Brown v. Board of Education*, 349 U.S. 294, 299, 75 S.Ct. 753, 756, 99 L.Ed. 1083:

'School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to

consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles.'"

Carson v. *Warlick*, 4th Cir. 1956, 238 F.2d 724, 728.

"'All that has been said in this present opinion must be limited to the constitutionality of the law upon its face. The School Placement Law furnished the legal machinery for an orderly administration of the public schools in a constitutional manner by the admission of qualified pupils upon a basis of individual merit without regard to their race or color. We must presume that it will be so administered. If not, in some future proceeding it is possible that it may be declared unconstitutional in its application. The responsibility rests primarily upon the local school boards, but ultimately upon all of the people of the State.'"

The Petitioners urge upon this Court the decision in *Gibson* v. *The Board of Public Instruction of Dade County*, 246 F.2d 913, from the Fifth Circuit, as an essentially identical legal situation and that it is in conflict with the decisions of the Fourth Circuit. Respondents call to the Court's attention that the *Shuttlesworth* case in the Fifth Circuit and written by the same Chief Judge, was rendered on May 9, 1958 whereas the *Gibson* decision was rendered July 23, 1957. Hence, from the language employed in the *Shuttlesworth* case by Judge Rives it is clear that there is no conflict between the Fifth Circuit and the Fourth Circuit. A cursory examination of the Gibson case indicates that the Board had taken the position of continuing to operate, maintain and conduct the schools on a non-integrated basis. The Court quotes the decision of the Fourth Circuit in *School Board of Char-*

lottesville, Va. v. *Allen*, 240 F.2d 59, 63, 64 (4th Cir. 1956) to the effect that the admission statute is a nullity as under the "announced policy of the respective school boards any such application to a school other than a segregated school maintained for colored people would have been futile; and equity does not require the doing of a vain thing as a condition of relief". This is far from the factual and legal status of the instant action. Respondents also call the Court's attention to the District Court's decision which we presume was rendered in conformity with the District Judge's understanding of the Circuit Court decision in *Gibson v. Board of Public Instruction of Dade County* on remand of that case to the District Court, 170 F.Supp. 454. Judge Lieb's understanding of the Fifth Circuit's opinion and of the *Shuttlesworth* case are contained in the following quotations:

> "As to the prayer of the Complaint that the Court order the Defendants to promptly present a plan of desegregation of the schools, the Court finds that the Florida Pupil Assignment Law enacted by the Legislature of Florida since the filing of this suit meets the requirements of such a plan and the demands of the Plaintiffs. That Act provides a comprehensive plan and directive for the enrollment and assignment of all pupils in the public schools by the Boards of Public Instruction of the several counties and for appeals from such decisions made by the Boards, all on an individual basis. No reference whatever is made in the Act to consideration of race or color of the pupils.
>
> "Plaintiffs made no challenge to the validity of the Pupil Assignment Law. It, therefore, enjoys a presumption of validity as a State Statute. Defendants as state officials are required to follow

the provisions of the State laws until they are repealed; superseded or held invalid by the Courts."

* * *

"It is noted that the provisions of the Alabama School Placement Law are similar in all material respects to those of the Florida Pupil Assignment Law, both of which were modeled after the North Carolina Pupil Placement Act.

"The three-judge court in the Birmingham case also denied all injunctive relief to the Plaintiffs and left them to the fair operation of the School Placement Law and the remedies therein provided. The Court in that case was likewise considering the issue raised by the Complaint as a basis for the application for an injunction that despite the passage of the Pupil Placement Act, Negro students were still being assigned to the same schools on a basis of segregation of the races irrespective of the nearness of other public schools to the homes of the plaintiffs.

"In that case also, the opinion shows that the School Board had refused to render any opinion or take any action upon tests given by the Board to Plaintiffs as a basis of assignment under the Act. It has already been noted that in the present case, the Plaintiffs themselves refused to proceed with clearly available procedure offered under the Florida law for relief from adverse decisions of the school authorities.

"In denying the injunction in the Birmingham case the three-judge court pointed out that any complaints of improper administration of the School Placement Law should be tested by the Courts only after exhaustion by the pupil or parent of the administrative remedies provided by the State law, and quoted from an opinion of the late great Chief Judge Parker, of the Fourth Circuit

Court of Appeals, in a similar case, *Carson* v. *Warlick*:

> "Somebody must enroll the pupils in the schools. They cannot enroll themselves; and we can think of no one better qualified to undertake the task than the officials of the schools and the school boards having the schools in charge. It is to be presumed that these will obey the law; observe the standards prescribed by the legislature, and avoid the discrimination on account of race which the Constitution forbids. Not until they have been applied to and have failed to give relief, should the Court be asked to interfere in school administration."

> "The plaintiffs now have available to them adequate remedies under the Pupil Assignment Law for any of their grievances pleaded in the Complaint. The record shows that they have not pursued them and until they do so and have been denied their rights they are not entitled to injunctive relief."

Petitioners then call the Court's attention to *Holland* v. *The Board of Public Instruction*, 258 F.2d 730, and the Circuit Court decision rendered by Judge Rives. There were two very important distinctions between this case and the instant action pending before this Court. In the *Holland* case there was an application by an individual plaintiff for admission to a particular school as well as a City Ordinance requiring compulsory residential segregation. The Court said: "In the light of compulsory residential segregation of the races by City Ordinance, it is wholly unrealistic to assume the complete segregation existing in public schools is either voluntary or the incidental result of valid rules not based on race."

Thus, the *Holland* case is brought clearly within the Virginia and Louisiana decisions of the Fourth and

Fifth Circuits respectively where despite an assignment statute, if there existed statutes which nullified the effectiveness of them, then quite clearly they need not be complied with. Again, this is not the situation in the instant case. The instant case falls clearly within the doctrine of *Carson* v. *Warlick*, *supra*, which has been quoted favorably in both the Fourth and Fifth Circuits in both the Virginia and Louisiana actions. *Orleans Parish School* v. *Bush*, 242 F.2d 156, 164; *School Board City of Charlottesville, Va.* v. *Allen*, 240 F.2d 59, 64; *Adkins* v. *School Board of Newport News*, 246 F.2d 325, affirming 148 F.Supp. 430. The Petitioners then turned from the Fourth and Fifth Circuits for a possible conflict to the District Court for the Middle District of Tennessee in *Kelly* v. *Board of Education City of Nashville*, 159 F.Supp 272. It is clear from the language by Petitioners on page 15 of their brief that the District Judge although recognizing the apparent scope of the Fourth Circuit decisions could not reach the same conclusions "on the facts of the instant case". The Court then said: "This is true because the Court is of the opinion that the administrative remedy under the Act in question would not be an adequate remedy". Thus, the District Judge in the *Kelly* case concluded that the facts were distinguishable from those contained in the Fourth Circuit cases and further concluded that the administrative remedy in Tennessee would "not be an adequate remedy". The Pupil Assignment Acts have not only been held by the various Circuit courts to be adequate administrative remedies but this Court has affirmed the Shuttlesworth case from the Fifth Circuit, *supra*, and denied certiorari in *Carson* v. *Warlick*, *supra*.

In conclusion, Respondents feel that some comment should be made on the third reason advanced by Petitioners for granting certiorari. Whereas the reason

set forth in the caption is that the decision below presents important questions of federal jurisdiction practice and procedure which should be resolved by this Court, the text which follows, for the most part, deals with matters foreign to the instant action and contentions raised for the first time in this Court—matters which were not raised by the complaint, nor urged upon the District and Circuit Courts. However, Respondent feels that it must make a few general remarks to the Petitioners' "broadside."

Petitioners hark back generally to the same argument that "race must be eliminated in consideration of assignment of children to the public schools". This has been admitted by the respondents in their answer to the pleadings, it was stated by Judge Hayes in his Opinion in the instant action on April 7, 1956, 139 F.Supp. 161 when he stated: "The validity of that part of the North Carolina Constitution requiring separate schools for the two races is no longer the subject for legal controversy. Nor is any statute—state or local—or order of the board compelling segregation of the public schools, a legal controversy now". Petitioners' argument in this section of the brief would lead this Court to believe that the North Carolina Assignment Act and its administration by the local boards is a planned method to continue segregation. They fail to take note of the instances of admission of Negro students to what were formerly "all white schools" in this State. Of course, Respondents contend that this sort of argument has no place in this action as Petitioners must clearly invoke their administrative remedy before the Court has any predicate upon which to act.

On page 19 of the brief is found the following: "Petitioners, however, view the federal judiciary's role

as being solely to eliminate the use of racial standards in the system and not to become involved in multitudinous individual assignments." Again, Respondents have clearly recognized the mandate of *Brown* v. *The Board, supra*, which requires them to eliminate the use of racial standards in the assignment of pupils. Of course, Respondents recognize the innuendo in this section of Petitioners' brief that there exists some "subterfuge" to maintain segregation in the schools. This, the Respondent denies, but even if it were so, the petitioners must place their action before the federal judiciary in a manner on which the Court may act. There are no facts concerning a "subterfuge". The Petitioners have had since 1955 to present to the federal judiciary evidence of "a subterfuge".

CONCLUSION

Petitioners have not made a case which would warrant this Court in granting Petition for Writ of Certiorari in accordance with Rule 19 of the Revised Rules of the Supreme Court of the United States. The Respondent prays that the Court refuse to issue Writ of Certiorari to review the Judgment and decision of the United States Court of Appeals for the Fourth Circuit entered in this cause on March 19, 1959, and that the Petition heretofore filed therefore be denied.

Respectfully submitted,

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